

BANK KERJASAMA RAKYAT MALAYSIA

a

v.

**DAYA PLAZA SDN BHD;
EMPIRE POSSESSION SDN BHD (INTERVENER)**

b

HIGH COURT MALAYA, KOTA BHARU
ARIFIN ZAKARIA J
[ORIGINATING SUMMONS NO: 24-29-1993]
22 JULY 1998

LAND LAW: *Charge - Chargee's duty to chargor - Sale of Malay reservation land by public auction - Whether proclamation of sale and advertisement ought to state that non-Malays may purchase land also - Whether failure to do so amounts to a misdescription - Whether failure to do so amounts to breach of duty of care owed by chargee to chargor - Whether chargor must prove loss suffered - Failure by chargor to produce valuation report to show land sold at an undervalue - Whether sale by public auction ought to be set aside*

d

LAND LAW: *Sale of land - Auction - Setting aside sale by public auction - Undertaking by chargor to postpone auction dishonoured - Whether good grounds for setting aside public auction - Whether chargee should have checked if auction postponed - Whether sale by public auction ought to be set aside*

e

LAND LAW: *Sale of land - Auction - Sale of Malay reservation land by public auction - Whether proclamation of sale and advertisement ought to state that non-Malays may purchase land also - Whether failure to do so amounts to a misdescription - Whether failure to do so amounts to breach of duty of care owed by chargee to chargor - Whether sale by public auction ought to be set aside*

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The defendant applied to set aside the sale by public auction of its lands ('the said lands') to the intervener and for the said lands to be reaucted at a revised reserve price.

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The defendant's grounds for so applying were as follows. Firstly, the defendant contended that the proclamation of sale and the advertisement, which described the said lands as Malay reserve land without clarifying that the said lands might be acquired by a non-Malay, was a misdescription which led to the said lands being sold at an undervalue. Secondly, the defendant asserted that the valuation report of the said lands was not reflective of their true market price as the valuation was based on the fact that the lands were Malay reserve land. However, no valuation report was submitted by the defendant to challenge the plaintiff's valuation report. Finally, the defendant contended that the plaintiff

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- a* had represented to the defendant that the public auction would be postponed to enable the defendant to raise the necessary finance, and that based on this representation, the defendant did not apply for a postponement.

Held:

- b* [1] There was nothing misleading in the particulars of ownership as stated in the proclamation of sale and advertisement of the said lands. It was clearly stated there that further particulars regarding the said lands may be obtained from the auctioneer or the plaintiff's solicitor. Therefore, anyone interested in the said lands could easily inquire from either one of them
- c* whether or not the said lands can be acquired by a non-Malay. There was no evidence to support that potential bidders had been deterred from attending the auction because of the reasons advanced by the defendant. The fact that the successful bidder was a non-Malay would further go against the defendant's contention.
- d* [2] The burden was on the defendant to satisfy the court, on a balance of probabilities, that the lands had been sold at a price below the market value. The defendant, however, did not submit a valuation report to challenge the valuation report submitted by the plaintiff. Thus, there was no alternative but to accept the valuation report submitted by the plaintiff.
- e* [3] The defendant should not have relied on the plaintiff's representation. Even, if the plaintiff had represented to the defendant that the auction would be postponed, the defendant was at liberty to check with the court to see whether the auction was postponed or not, and, if necessary, to
- f* apply for a postponement. Furthermore, even if the defendant were to seek for a postponement of the auction, there was no guarantee that it would have been granted.

[Application dismissed.]

g **Case(s) referred to:**

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175 (*refd*)
Cuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd [1971] 2 All ER 633 (*refd*)
Kuala Lumpur Finance Bhd v. Yap Boh Khian [1992] 1 MLJ 472 (*refd*)
Mc Hugh v. Union Bank of Canada [1913] AC 311 (*refd*)

h **Legislation referred to:**

Malay Reservation Enactment 1930, ss. 3, 13A(iii)

For the plaintiff - Ahmad Marzuqi Hj Mokhtar; M/s Shahinuddin & Ranjit

For the defendant - KT Tan; M/s Lim Kian Leong & Co

- i* *For the intervener* - Teo Poh Onn (Chew Kok Lian with him); M/s Teo & Chew

Reported by Usha Thiagarajah

JUDGMENT

Ariffin Zakaria J:

This is an application by the defendant, to set aside the sale by public auction of lands held under documents of title grant nos. 16101, 16102, 16103, 16104, 16105 and 16107, Lots 2, 3, 4, 5, 6, 7 and 8, s. 8, Kota Bharu, Kelantan (hereinafter referred to as “the said lands”) to Empire Possession Sdn. Bhd. and for the said lands to be reaucted at a revised reserved price to be determined by the court (encl. 69). This application is supported by the affidavit of Nik Ab. Rahman bin Nik Taib (encl. 66) who is a director of the defendant company.

The defendant advanced three grounds in support of this application namely -

- 1) misdescription of the said lands both in the proclamation of sale and the advertisement;
- 2) the valuation of the said lands was made on the basis that the said lands were Malay reserved land;
- 3) the plaintiff through its chairman had made representation to the defendant’s director that the auction on 24 November 1997 will be postponed to enable the defendant to raise the necessary finance.

For convenience I shall deal with the first and second grounds together.

The 1st Ground

It is common ground that the documents of title to the said lands carry the endorsement “Kawasan Simpanan Melayu” and that the said lands are reservation land as defined in s. 3 of the Malay Reservation Enactment, 1930 (“the Enactment”). It was also not in dispute that the said lands may be transferred to a non Malay based on s. 13A(iii) of the Enactment which provides that:

(iii) Nothing in this section shall prevent the transfer or transmission of the right or interest in reservation land of any person not being a Malay to any other person not being a Malay always provided that such right or interest shall have been acquired prior to the creation of the Malay Reservation in which the land is included.

In this case the right or interest of the said lands were acquired by one Gan Mek a non Malay prior to the declaration of the Malay reservation in which the said lands were included. The defendant, who is the current registered owner of the said lands is also not a Malay. Therefore, as rightly contended by the defendant, the said lands may be sold to a non Malay despite of the fact that they are reservation land.

- a* It was contended for the defendant that in both the proclamation of sale and the advertisement, the said lands were described as “Kawasan Simpanan Melayu” without further explanation or clarification that the said lands may be acquired by a non Malay. En. K.T. Tan for the defendant contended that as a result of that, the said lands were auctioned off at a price far lower than
- b* their true or fair market price. He based his submission on the premise that this lack of explanation had the effect of deterring the non Malays from participating in the auction because they would have thought that the said lands could not be acquired by a non Malay.

The 2nd Ground

- c* The defendant further attacked the valuation report submitted by the plaintiff to court for the purpose of fixing the reserve price for the said lands. It was contended on behalf of the defendant that the comparables used by the valuer in the said report are Malay reserve lands owned by Malay unlike the said
- d* lands which are land within Malay reserve area but are owned by a non Malay. He said the said lands would have fetched a far higher price than the four comparables used by the valuer. As for the 5th comparable he said this is also not a good comparable because this property is located in a different locality and is outside the Malay reserve area. For the above reasons
- e* it is submitted by the defendant that the valuation as contained in the report is not reflective of the true market price of the said lands. Following from that it was said that the reserve price of the said lands as determined by the SAR was markedly lower than the true or proper market price of the said lands.

The Law

- f* It was submitted that the plaintiff chargee is under a duty of care in the conduct of sale to ensure that the interest of the defendant is not wilfully and recklessly sacrificed.
- g* The duty of chargee in exercising the power to sell under the National Land Code came for consideration in the local case of *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 MLJ 504. There, Edgar Joseph Jr J (as he then was) after considering a long line of authorities from other commonwealth jurisdictions at p. 516 expressed the following opinion:
- h* It is settled law that a chargee in exercising the power to sell under the Code owes a duty to a chargor which flows from equity’s recognition that a chargor has an interest in the surplus (if any) arising from the sale.
- i*

The issue of the appropriate standard of care owed by the chargee to the chargor is not free from difficulty. One line of authority is to the effect that a mortgagee's only duty is to act *bona fide* in the conduct of the sale (see *Kennedy v. De Trafford*; *Warnor v. Jacob*). In the latter case, Kay J said at p. 224:

... a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

In the Australian case of *Pendlebury v. Colonial Mutual Life Assurance Society Ltd.* Issacs J stated at p. 699 that 'so long as [the mortgagee] observed specified formalities and acts in good faith his conduct cannot be challenged'.

The opposite line of authority is exemplified by the English Court of Appeal case of *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* where Salmon LJ based the obligation of the mortgagee, not on a standard of behaviour imposed by equity but on a legal duty based on the tort of negligence and stemming from the proximity of the mortgagor and the mortgagee. What his Lordship said was this:

Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.

In Australia, the controversy as to which test is the appropriate test to apply - the more stringent test laid down in *Cuckmere* setting a higher standard for the mortgagee or the more relaxed test laid down in *Pendlebury* - remains to be resolved by the High Court.

I note, however, that in the Hong Kong Privy Council case of *Tse Kwong Lam v. Wong Chit Sen* their Lordships accepted the *Cuckmere* test. I would respectfully do the same.

Similarly in *Kuala Lumpur Finance Bhd v. Yap Boh Khian* [1992] 1 MLJ 472 Lim Beng Choon J had adopted the test as laid down in *Cuckmere Brick Co. Ltd. & Anor v. Mutual Finance Ltd.* [1971] 2 All ER 633, that is, the duty to take reasonable care to obtain a proper price.

Salmon LJ in *Cuckmere* at p. 646 of the report stated the duty of the mortgagee in the following words:

- a* I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

b Lord Moulton in *Mc Hugh v. Union Bank of Canada* [1913] AC 311 which was cited with approval by Salmon LJ in *Cuckmere* stated the duty as follows:

- c* It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonableman would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

The Proclamation Of Sale And Advertisement

- d* In the instant case, the particulars of ownership as contained in the proclamation of sale and advertisement stated, *inter alia*, that the said lands are subject to the restriction in interest as “Kawasan Simpanan Melayu” or Malay reserve. These are the particulars as found in the documents of title of the said lands. To that extent there is nothing misleading in the particulars of ownership. The learned counsel for the defendant, however, argued that the
- e* particulars as given in the proclamation of sale and the advertisement may give rise to the wrong impression that the said lands may only be acquired by Malay.

- f* Thus he contended, to avoid the wrong impression the proclamation of sale and the advertisement should have stated categorically that eventhough the said lands are Malay reservation land they may be acquired by a non Malay. By failing to do so, the plaintiff was in breach of the duty of care towards the defendant. The plaintiff, on the contrary argued that it is not under any duty to do so. Further more, in the proclamation of sale and advertisement it is clearly stated that further particulars regarding the said lands may be obtained
- g* from the auctioneer or the plaintiff’s solicitor. Therefore, any one who is interested in the said lands may easily inquire from either one of them whether or not the said lands can be acquired by a non Malay. In the circumstances, he said, the plaintiff could not be faulted.

- h* It was also submitted for the plaintiff that there is no evidence to show that any potential bidders had been deterred from attending the auction for the reasons advanced by the defendant. I agree that, the submission by the defendant is based wholly on assumption without any evidence to support. The fact that the successful bidder in this case is a non Malay would further demolish that assumption.
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The Valuation

What is even more fatal to the defendant's case is that even assuming for the sake of argument that there was a breach of duty of care by the plaintiff in the conduct of the auction of the said lands, the burden is on the defendant to prove that the defendant has suffered damage as a result thereof. This means to say that the defendant has to satisfy the court, on balance of probabilities, that the said lands had been sold at a price below the market value. Since this issue involves the valuation of the said lands, therefore, it is necessary for the defendant to submit its own valuation report to challenge the valuation report submitted by the plaintiff. This was not done. In the circumstances, the court is left with no alternative but to accept the valuation report submitted by the plaintiff.

For the above reasons I find there is no merit in the 1st and 2nd grounds advanced by the defendant.

Misrepresentation By Chairman Of The plaintiff

It was alleged by the defendant that at the meeting held on 19 November 1997 between the chairman of the plaintiff and Nik Ab. Rahman bin Nik Taib, a director of the defendant, it was represented to the said Nik Ab. Rahman that the auction of 24 November 1997 will be postponed. The chairman of the plaintiff was alleged to have given the undertaking that he will give the necessary directive to the relevant officer of the plaintiff to have the auction postponed. In view of the said representation the defendant claimed that the defendant did not take any step to have the auction postponed. I don't think this could constitute a proper ground to have the auction set aside. Even if what was said by the defendant's director was true, the defendant is always at liberty to check with the court to see whether the auction had been postponed or not and if necessary to apply for postponement. Furthermore, even if the defendant were to seek for an adjournment of the auction there is no guarantee that it will be granted. For these reasons I find that there is no merit in the third ground relied upon by the defendant.

In the result I dismiss the defendant's application with costs to be taxed.
